(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 2003

RIGOBERTO AVILA, JR.
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. Does a State violate a capital defendant's right to Due Process of Law under the Fourteenth Amendment when it introduces during the guilt-innocence stage of trial extremely gruesome photographs of the mutilated remains (caused by the autopsy itself) of the infant murder victim, even though these photographs admittedly have no relevance to any guilt-innocence issue presented and admittedly have a high tendency to encourage resolution of material issues on an inappropriate emotional basis?

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OPINIONS BELOW

There is only one opinion in this case. It is from the Texas Court of Criminal Appeals, the highest criminal court in Texas. This written opinion appears at Appendix A to this petition. It was not designated for publication. On the last page of the court's opinion, the words "Do Not Publish" appear.

BASIS FOR JURISDICTION

The highest state court decided this case on July 2, 2003. A copy of that decision appears at Appendix A. A timely motion for rehearing was thereafter denied on September 10, 2003. A copy of the order denying rehearing appears at Appendix B. The jurisdiction of this Court to review the judgement rendered in this case is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law....

Tex. R. Crim. Evid. 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Tex. R. App. Proc. 44.2, captioned "Reversible Error in Criminal cases," states:

> (a) Constitutional Error.
>
> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.
>
> (b) Other Errors.
>
> Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

On February 29, 2000, at about 6:00 o'clock p.m., Marcelina Macias left her residence to attend a class, leaving her 19 month old son, Nicolas Macias, and her other son, four year old Dylan Salinas, in Petitioner's care. Opinion, *App. A*, at p. 2a. During her absence, Petitioner placed a "911" call at 7:02 o'clock p.m. and advised the "911" operator that Nicolas Macias had stopped breathing. Id. Paramedics arrived shortly thereafter and administered emergency treatment to the child before taking him to the hospital. Id. Surgery was performed on the infant at the hospital in an attempt to save the infant's life. Id. However, the attempt to save the child's life was unsuccessful and the infant died. Id.

On March 16, 2000, Petitioner, Rigoberto Avila, was charged by indictment with the offense of capital murder. (CR 3). The indictment alleged in relevant part that Avila knowingly and intentionally caused the death of Nicolas Macias, a child younger than six years of age, by striking Nicolas Macias with his foot. RR 19, 19-20.

During the trial, there was no dispute as to the cause of the infant's death. The three physicians who testified (one

of whom was Petitioner's defense expert) all agreed that the infant died from blunt force trauma directed to the abdominal section of his body. One of these physicians was the County Medical Examiner, Dr. Juan Contin. RR 20, 24. He informed the jury that his post-mortem examination of Nicolas Macias revealed that the child had sustained "a blunt force injury, a crushing injury," which had caused an avulsion or detachment of the duodenum, detachment of the duodenum from the spine, and the cutting of the child's pancreas in two. RR 20, 30-31.

Another expert to testify was Dr. George Raschbaum, the emergency room physician who operated on the infant and tried to save his life. RR 21, 18. Dr. Raschbaum confirmed Dr. Contin's findings. He identified the injury which necessitated the emergency operation he performed as being the first part of the infant's intestines (the duodenum), which were split into two pieces midline over the spine. RR 21, 32, 42, 65-66. He also indicated that the infant's pancreas had been split in two. RR 21, 32. The third physician (defense expert Dr. Fausto Rodriguez) likewise agreed with both Contin and Raschbaum's findings that blunt force trauma to the child's abdominal area was the cause of the child's death. RR 22, 22-25.

The Texas Court of Criminal Appeals acknowledges in its Opinion that blunt force trauma to the infant's abdominal area was the cause of the infant's death. See Opinion, *App. A*, at p. 2a. It nevertheless rejected Petitioner's contention on appeal (point of error four of his brief) that the trial court erred in admitting before the jury, over his trial counsel's Tex. R. Crim. Evid. 403 evidence objection, two autopsy photographs introduced into evidence as State's Exhibit 17 and State's Exhibit 18. *App. A*, at pp. 22a and 23a. Error was preserved because Petitioner's trial counsel objected to the introduction of these autopsy photos on the basis of Tex. R. Crim. Evid. 403, arguing that these photos were were horrific and gruesome in nature. RR 20, 38-39. These autopsy photos displayed mutilated parts of the infant unrelated to the stomach/abdominal injuries which caused the infant's death. Id., at pp. 18a. Appended to this writ petition as *App. C* are true and correct photocopies of these autopsy photos.

Texas Rule of Criminal Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless

presentation of cumulative evidence." In conducting its review of the trial court's Rule 403 ruling, the Texas Court of Criminal Appeals provided the following description of these two autopsy photos:

> The exhibits at issue are three 5-inch by 7-inch color autopsy photographs ... State's Exhibit 17 shows the upper one-third of Nicholas' body. His chest is still open with the ribs spread and the organs removed, and the front half of his scalp has been cut and peeled down over his face. Finally, State's Exhibit 18 shows Nicholas' head and shoulders from the back. In this photograph, the back half of Nicholas' scalp has been peeled down and is hanging across Nicholas' shoulders much like a hood on a jacket would hang down. Each photograph is close-up, highly graphic, and extremely gruesome. Opinion, *App. A*, at p. 15a.

The Texas Court of Criminal Appeals further observed that bruises found on the child's head were a few days old and could not have been inflicted at the same time as the injury which caused the infant's death. Opinion, *App. A*, at p. 18a. It accordingly held that "these two photographs [State's Exhibits 17 and 18] were not relevant in the guilt phase of appellant's trial and should not have been subjected to a Rule 403 balancing test or admitted into evidence over appellant's [i.e. Petitioner's] objection." Id. at p. 18a. In stressing the extreme gruesomeness of the two autopsy photos, the Court of Criminal Appeals observed:

> State's Exhibits 17 and 18 have little probative value, if any. The State failed to connect the injuries depicted in the photographs to appellant [Petitioner]. Indeed, one expert witness testified that the bruises were consistent with infant rambunctiousness or accident and did not signal intentional abuse. The photographs were in no way necessary to show the extent of the injuries that appellant caused.
>
> On the other hand, these photographs have a high tendency to 'encourage resolution of material issues on an inappropriate emotional basis.' ... Both photographs are in color and close-up. By no action attributable to appellant, both are extremely graphic and gruesome in that the boy's scalp has been turned inside out, and one picture further depicts an empty shell of a body. Testimony further revealed that some damage was done to the skin under the scalp as the medical examiner peeled it back. However, while the damage that the medical examiner inflicted is the central focus of the pictures, it does not make up the entire picture. Rather, enough of the boy's intact body features are shown around the edges of the pictures to remind the viewer that he is looking at the remains of a small boy. Plus, the inclusion of the pictures allowed the implication that appellant somehow had something to do with the infliction of the bruises found on the child's scalp. Opinion, *App. A*, at pp. 20a-21a.

After providing this description, the Court of Criminal Appeals next determined that the trial court had abused its discretion in admitting the two referenced autopsy photographs. Opinion, *App. A*, at 21a. However, it did not set aside Petitioner's death penalty conviction on this basis. Rather, it

applied the harm analysis specified in Tex. R. App. Proc. 44.2(b), the appellate rule specified for use in determining whether error of a non-constitutional nature is reversible. This rule states that "[a]ny other error, defect, irregularity, or variance [other than constitutional error] that does not affect substantial rights must be disregarded." Id., at p. 22a. Characterizing the error in admitting the photographs as non-constitutional in dimension, the Court of Criminal Appeals performed its analysis by first noting that Petitioner was the last adult with Nicholas Macias before he received a crushing blow to the abdomen which caused his internal organs to be severed. Id., at 22a. It then observed that the medical examiner had clearly testified that the bruises on Nicholas' head were not inflicted on the day of his death, nor did they contribute to his death. Id. Lastly, it determined that the testimony concerning the bruises was brief and not emphasized. Id. At this point, it concluded that the resulting error was not reversible because it did not influence the jury at either stage of the trial, or had but a slight effect. Id. at pp. 22a-23a.

In conducting its harm analysis, the Court did not consider the impressive quantity of evidence presented by several defenses witnesses, all of which supported a finding that Petitioner did not constitute a future, ongoing threat or danger

to society so as to warrant imposition of the death penalty. See RR 24, 92-162; State's Exhibit 1, RR 26. Cumulatively, this evidence established that Petitioner was a 31 year old man with no criminal record; that he had never been connected with a gang; that he had joined the Navy right after high school – and had always remained gainfully employed after leaving the Navy. Nor did it consider that Petitioner had a child, whom he loved and supported. Id.; See also Petitioner's brief (at page 48) filed with the Court of Criminal Appeals and the Court of Criminal Appeals Opinion, *App. A*, at p. 31a, which confirms that at punishment, the State presented no evidence which connected Petitioner to a prior criminal history or other bad acts.

REASONS FOR GRANTING THE PETITION

Petitioner argued to the Court of Criminal Appeals that the trial court's decision to admit the two above-referenced autopsy photos, over his trial counsel's Rule 403 objection, resulted in an abuse of discretion and required that his conviction be set aside. Although the Court of Criminal Appeals based its rejection of this argument on a state evidence rule, its decision should nevertheless be reviewed because it has decided an important question of federal law that has not, but should be decided by this Court. The federal question presented is: Can the State violate a capital defendant's right to Due

Process of law by introducing during the guilt-innocence stage of trial extremely gruesome autopsy photos of the mutilated remains (caused by the autopsy itself) of an infant murder victim, even though these autopsy photos admittedly have no relevance to any guilt-innocence or punishment issue presented in the case and admittedly have a high tendency to encourage resolution of material issues on an inappropriate emotional basis, to the point of depriving the capital defendant of a fundamentally fair trial?

Several intermediate federal courts of appeal have addressed the same or a similar question and have answered the question in the affirmative. See e.g. Spears v. Mullin, 343 F.3d 1215, 1225-1230 (10th Cir. 2003)(setting aside both petitioners death penalty convictions and holding that the punishment phase of their trial was fundamentally unfair because extremely gruesome photos introduced during punishment so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.); Villafuerte v. Lewis, 75 F.3d 1330, 1343 (9th Cir. 1996)(holding that a federal due process claim exists if the introduction of photographs renders a defendant's trial fundamentally unfair.); and Osborne v. Wainwright, 720 F.2d 1237, 1238-1239 (11th Cir. 1983)(acknowledging that unduly prejudicial photos which

deprive a defendant of a fundamentally fair trial is sufficient to establish a Fourteenth Amendment due process violation).

Thus, Petitioner's complaint that the above-referenced autopsy photos so fatally infected the trial of his case that he was denied fundamental fairness properly represents a federal question which should be addressed by this Court. This Court should further grant review because the Court of Criminal Appeals' determination that the referenced photographs did not result in a denial of Petitioner's substantial rights is in conflict with numerous decisions of this Court, all of which have generally recognized that a conviction should be aside on due process grounds if it results from evidence which is so prejudicial that it deprives a defendant of a fundamentally fair trial.

In Payne v. Tennessee, 501 U.S. 808, at 825 (1991), for example, the United States Supreme Court stated: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Likewise, in Romano v. Oklahoma, 512 U.S. 1 (1994), the Court reaffirmed the validity of Payne, stating: "It is settled that the Clause [the Due Process Clause of the Fourteenth

Amendment] applies to the sentencing phase of capital trials." Id., at 12. The Court again reiterated the importance of the Due Process Clause with regard to ensuring that no defendant is convicted after a fundamentally unfair trial in Estelle v. McGuire, 493 U.S. 342 (1991). There, the Court of Appeals for the Ninth Circuit had ruled that the admission of prior act evidence in the petitioner's state trial, in "conjunction with a prejudicial instruction, 'rendered [petitioner McGuire's] trial arbitrary and fundamentally unfair,' in violation of due process." Id., 493 U.S. at 67.

The same issue was then taken up by this Court. After reviewing the record, this Court first determined that the Ninth Circuit had erred in basing its ruling concerning prior act evidence partly on California state law. It then turned to the question of whether the complained-of evidence violated McGuire's federal constitutional rights. Upon analyzing the effect of the instruction and the prior act evidence, this Court ultimately determined that "neither the introduction of the challenged evidence, nor the jury instruction as to its use, so infused the trial with unfairness as to deny the petitioner due process of law." Id., at 75. See also Lisenba v. California, 314 U.S. 219 (1941), approvingly cited by the Court for this proposition.

Still another decision to recognize that a fundamentally unfair trial brings into consideration the Due Process Clause is Riggins v. Nevada, 504 U.S. 127 (1992). The petitioner in that case sought review before this Court after the Nevada Supreme Court affirmed his death penalty conviction and rejected his complaint that the State of Nevada's involuntary administration of an anti-psychotic drug into his system during his trial denied him a "full and fair trial." Id., at 133. This Court refused to adopt the dissent's suggestion that petitioner should be required to show how the trial would have proceeded differently if he had not been involuntarily administered the anti-psychotic drug. Id., at 137. Instead, after concluding that requiring the petitioner to stand trial under the influence of the anti-psychotic medication might have had an impact on the petitioner's outward appearance, the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communications with counsel, this Court determined that efforts to prove or disprove actual prejudice from the record would be futile. Id. at 137. It accordingly held that the petitioner's right to due process had been violated under the Fourteenth Amendment and set aside his conviction. In doing so, the Court presumed that the anti-psychotic drug involuntarily administered to the petitioner had been administered in a medically appropriate manner. Id., at 133.

Because of its concern that no defendant should be deprived of a fundamentally fair trial, this Court has dispensed with the normal rules of procedural default whenever a substantial showing is made that a defendant has been deprived of a fundamentally fair trial. The decision of Estelle v. McGuire illustrates this point. The petitioner in that case did not present a federal due process challenge at the state court level with regard to the prior act injury evidence and jury instruction of which he complained. The issue of whether the prior act injury evidence or the complained-of jury instruction rendered McGuire's trial fundamentally unfair was thus raised for the first time in McGuire's petition for writ of habeas corpus to the United District Court for the Northern District of California, after the California Supreme Court's decision to deny review of his case. On review of the Ninth Circuit's decision that the error complained of had rendered McGuire's trial arbitrary and fundamentally unfair, this Court was not at all concerned over the fact that McGuire had not raised the due process complaint at the state court level. With regard to the jury instruction, it clarified that it would not undertake a review of any state law issues presented, or even attempt to decide whether state law had been properly interpreted. Id., at 72. Nevertheless, it did state that the question it did have to decide was "whether the ailing instruction by itself so infected the entire trial that the

resulting conviction violates due process." Id. The decision thus demonstrates that this Court will not apply the normal rules of procedural default where it is convinced a substantial showing has been made by a defendant that he or she has been deprived of a fundamentally fair trial.

The Court's analysis in Estelle v. McGuire is in accord with Smith v. Murray, 477 U.S. 527, at 538-539. (1986), where this Court recognized that normal rules of procedural default would not apply where there is a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." Id., at 538-539. The facts of that case are instructive. Although the Court held that the petitioner had procedurally defaulted his constitutional claims, the Court made clear that it still needed to determine whether a "fundamental miscarriage of justice" had occurred with regard to the alleged sentencing error under review. The procedurally defaulted claim concerned whether testimony provided by a private psychiatrist during the petitioner's trial had violated the petitioner's Fifth Amendment and Fourteenth Amendment rights under the United States Constitution. The psychiatrist had been appointed by the trial court at defense counsel's request to conduct an examination of the petitioner. The purpose of the examination was to assist defense counsel in exploring the

possibility of presenting a number of psychiatric defenses on behalf of the petitioner.

However, during the examination, the petitioner's rights under the Fifth and Fourteenth Amendments were violated when the psychiatrist elicited information from the petitioner about the murder offense for which he was on trial and about a prior, sexual incident unrelated to the murder offense for which he was on trial. Specifically, the petitioner related to the psychiatrist that on a prior occasion, he had torn the clothes off a girl on a school bus before deciding not to carry out his original intention to rape her. The petitioner was convicted in the guilt-innocence phase of trial of the rape and murder for which had been indicted. In the sentencing phase of trial which followed, the State called the psychiatrist who had examined the petitioner to the stand, over defense counsel's objection, and had the psychiatrist describe the incident wherein the petitioner had stripped a girl's clothes while on a school bus, so as to rape her.

In addressing the petitioner's Fifth and Fourteenth Amendment claims, this Court first determined that the petitioner had failed to meet the "cause" prong of the "cause and prejudice" test which this Court first recognized in

Wainright v. Sykes, 433 U.S. 72 (1972) and later expounded upon in Murray v. Carrier, 477 U.S. 478 (1986). Before affirming the lower court's decision and dismissing the petitioner's writ petition, however, the Court ruled that "'[in] appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" Id., at 537. It then proceeded to determine whether the error of allowing the psychiatrist's testimony to be introduced would result in a "fundamental miscarriage of justice." For purposes of this analysis, it assumed that it was error to allow the psychiatrist's testimony about the bus incident to be presented before the jury. Id. The Court then considered its likely effect on a jury in light of the record as a whole. Id. In the end, the Court stated that it did not believe its refusal to consider the defaulted claim carried with it the risk of a manifest miscarriage of justice. Id.

The Court's treatment of the issue of procedural default in Smith v. Murray, where a substantial showing was made that a defendant had been deprived of a fundamentally fair trial, was carried forward in Romano v. Oklahoma, supra. In that case, the State erroneously presented before the jury a copy of the judgment and death sentence the petitioner had been assessed

in an earlier trial for another murder. On appeal to the Oklahoma Court of Criminal Appeals, Romano argued that the trial court had improperly admitted the conviction because the conviction was not final at the time of the trial and had since been overturned. He further argued that evidence of the conviction impermissibly reduced the sentencing jury's sense of responsibility for its decision, in violation of Caldwell v. Mississippi, 472 U.S. 340 (1985).

At no point did Romano argue that the introduction of his prior conviction rendered his case fundamentally unfair or argue that the introduction of this evidence caused a manifest miscarriage of justice to result. Moreover, the single federal question upon which the Court granted certiorari did not directly raise the issue of whether Romano was provided a fundamentally fair trial. The question presented was: "Does admission of evidence that a capital defendant already has been sentenced to death in another case impermissibly undermine the sentencing jury's sense of responsibility for determining the appropriateness of the defendant's death, in violation of the Eighth and Fourteenth Amendments?" Id., at 6.

Accordingly, even though the issue of whether the evidence of this prior conviction deprived the petitioner of a

fundamentally fair trial was not specifically before the Court, this Court, after rejecting the petitioner's *Caldwell* claim, took it upon itself to decide whether the petitioner's complaint that the admission of the prior conviction "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." Id., at 12-13. That is, this Court proceeded to analyze whether the evidence of this prior conviction had rendered Romano's trial fundamentally unfair, even though it was not asked to do so. Id., at 12-14.

The Court's decisions in Smith v. Murray and Romano v. Oklahoma thus confirm beyond any doubt that punishment evidence introduced in a capital murder prosecution may be so prejudicial as to be deemed fundamentally unfair so as to violate the Due Process Clause. These decisions further confirm that even if the error has been procedurally defaulted and the petitioner cannot establish cause and prejudice for the procedural default, review by this Court is appropriate. The Court has in effect carried forward the same test it had earlier recognized in Engle v. Isaac, 456 U.S. 107 (1982), where it stated:

> The terms "cause" and "actual prejudice" are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration. Id. at 135.

Turning to the operative facts of this case, the first issue to be decided is whether Petitioner procedurally defaulted the Fourteenth Amendment Due Process claim he presents to this Court. Petitioner believes he has not procedurally defaulted this claim since he has essentially presented the same due process complaint regarding the above-referenced autopsy photos at both the trial court level and on direct appeal to the Texas Court of Criminal Appeals. The review standard employed by the Texas Court of Criminal Appeals under Tex. R. App. Proc. 44.2(b) -- whether the admission of these photos affected Petitioner's substantial rights -- arguably is similar to the review standard employed by this Court in addressing a due process complaint, i.e. whether a petitioner has been deprived of a fundamentally fair trial. It therefore appears that this standard, which appears to be rooted in due process considerations, provided the State of Texas with ample notice and a full and adequate opportunity to address the due process challenge Petitioner has presented by this writ petition.

Consequently, it would seem that the State of Texas has in effect rejected Petitioner's federal due process claim, even though it has not made specific reference to the Due Process Clause in affirming Petitioner's conviction. For this reason, Petitioner asserts that he has not procedurally defaulted the

federal question he presents to this Court. From the very beginning, Petitioner has basically taken the position that the two referenced autopsy photos were so prejudicial that they deprived him of a fundamentally fair trial. The State of Texas cannot assert that it is now surprised by the due process challenge Petitioner now asserts with regard to these autopsy photos.

But even if Petitioner has procedurally defaulted his claim with regard to these extremely gruesome photos, this Court's decisions in Murray v. Smith and Romano v. Oklahoma, supra, establish that Petitioner need not establish cause for the default, nor demonstrate that prejudice has resulted. These decisions make clear that if the admission of these autopsy photos so infected the trial process as to deprive Petitioner of a fundamentally fair trial, this Court should review Petitioner's claim anyway.

A review of the relevant facts of this case reinforces Petitioner's argument that review of the federal question presented is appropriate, irrespective of whether procedural default occurred. As the Court of Criminal Appeals itself concedes, the two autopsy photos of which Petitioner complains were not relevant to any issue in the case. Even though it was

blunt force trauma to infant Nicholas Macias' lower stomach and abdominal area which killed the infant, the complained-of autopsy photos do not depict any part of the abdominal or stomach area of the infant. The one photo which does show the infant's torso is of no assistance to an understanding of the infant's injuries either, since all of the internal organs have been removed. Aside from having no relevance, this photo is particularly prejudicial because it makes the infant's body appear much like a butchered carcass.

The depiction of the peeled back scalp in the same photo is also extremely gruesome and prejudicial. It gives the child a faceless appearance, without eyes, ears or a nose. The presence of the folded down scalp only adds to the grotesqueness of the photo. The effect of this hanging piece of scalp, which is pulled from the top of the head down over half of the infant's face, is to obscure the other half of the infant's otherwise obliterated face. The other autopsy photo is equally prejudicial. It shows the back side of the infant, with half of the scalp pulled down behind the infant's neck and allowed to hang, so as created the impression that the infant is wearing a hooded jacket. Also observable are what to appear to be chunks of skin or flesh missing from the back of the child's head, which as the Court of Criminal Appeals notes, are injuries which may have been

attributed to Petitioner by the jury, but were caused when the scalp was pulled back by the medical examiner. These injuries were accordingly caused by the autopsy procedure itself, not by Petitioner.

The cumulative effect of both autopsy photos is such to make 19 month old Nicholas Macias not only appear as if he were some sort of butchered animal, but his faceless appearance, with half his scalp pulled down on the front of his head and the other half pulled down on the back side of his head, is enough to inform the viewer that he or she is viewing human remains, although the corpse no longer really appears to be human. It therefore comes as no surprise that the Court of Criminal Appeals determined that both autopsy photos had a high tendency to "encourage resolution of material issues on an inappropriate emotional basis," given the extra-prejudicial effect created by the fact that the autopsy photos are in color, were taken close-up, and are relatively large (5 inches by 7 inches in size).

It is also not surprising that the Court of Criminal Appeals conceded on direct appeal that "By no action attributable to appellant [Petitioner herein]," both [autopsy photos] "are extremely graphic and gruesome in that the boy's

scalp has been turned inside out, and one picture further depicts an empty shell of a body." Indeed, the Court of Criminal Appeals goes on to relate that the prejudicial effect of the two autopsy photos was heightened by "Testimony [which] further revealed that some damage was done to the skin under the scalp as the medical examiner peeled it back." The Court of Criminal Appeals does not stop there, however. It also points out that "the damage that the medical examiner inflicted is the central focus of the pictures", that "enough of the boy's intact body features are shown around the edges of the pictures to remind the viewer that he is looking at the remains of a small boy," and that "the inclusion of the pictures allowed the implication that appellant [Petitioner} somehow had something to do with the infliction of the bruises found on the child's scalp."

The Court of Criminal Appeals' determination on the one hand that the trial court erred in performing its Rule 403 analysis in allowing both autopsy photos into evidence during the guilt-innocence stage of trial and its determination, on the other, that the error was harmless therefore makes no sense. The autopsy photos which the State introduced were more than just gruesome. They were grisly and horrific, especially given Nicholas Macias' tender age. To conclude otherwise is to ignore common sense and reason and to assume that jurors are

not affected by extremely gruesome, atrocious, and grotesque evidence.

In short, it takes no legal scholar to recognize the effect the two autopsy photos had on the jury, particularly with those jurors who sanctify life and cherish infants innocent of any wrongdoing. The jurors in Petitioner's case were likely confronted with the most gruesome autopsy photos they had ever seen. These photos not only likely had the intended effect of causing the members of Petitioner's jury to become sick to their stomach, they no doubt caused the members of the jury to seethe with rage. At a minimum, it is reasonable to believe that the members of the jury were unable to keep the emotional balance necessary to conduct a proper deliberation of the evidence presented to them. Among other things, this evidence included un-refuted testimony that Petitioner had never before been convicted of a criminal offense, testimony that he had a child whom he loved and supported, and testimony that Petitioner had always remained gainfully employed and was a productive member of society.

The decision to admit the referenced autopsy photos thus deprived Petitioner of a fundamentally fair trial and resulted in a manifest miscarriage of justice. Even if the determination

is made that these autopsy photos did not render the guilt determination of Petitioner's trial fundamentally unfair, it still follows that the likely effect these photos had on the jury rendered the punishment phase of Petitioner's trial a manifest miscarriage of justice. It is indeed very likely that these photos destroyed any hope Petitioner had of avoiding the death penalty.

CONCLUSION

Based on the analysis provided above, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO.74,142

RIGOBERTO AVILA, JR., Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM EL PASO COUNTY

MEYERS, J., *delivered the opinion of the Court, in which* KELLER, P.J., *and* PRICE, KEASLER, HERVEY, HOLCOMB, and COCHAN, J.J. *joined.* WOMACK *and* JOHNSON, J.J., *concur.*

OPINION

In May 2001, a jury convicted appellant of capital murder. TEX. PENAL CODE ANN.§19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure Article 37.071, §§ 2(b) and 2(e), the trial judge sentenced appellant to death. Art. 37.071, § 2(g).[1] Direct appeal to this Court is automatic. Art. 37.071, § 2(h).

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[1] Unless otherwise indicated this and all future references to Articles refer to the Code of Criminal Procedure.

Appellant raises eleven points of error. Because appellant challenges the sufficiency of the evidence at punishment, a brief statement of facts will be helpful. We affirm.

STATEMENT OF FACTS

Around 6:00 p.m. on February 29, 2000, Marcelina Macias left her home to attend a class, leaving her 19-month-old son, Nicholas Macias, and his four-year-old brother, Dylan Salinas, in appellant's care. At 7:02 p.m. appellant called "911" and told the operator that the infant boy he was babysitting had stopped breathing. When the paramedics arrived, they administered emergency treatment to the child before transporting him to the hospital. While treating the boy, paramedics found a bruise on Nicholas' stomach in the shape of a boot print. When they asked appellant, he denied any knowledge of the marking. At the hospital, doctors determined that surgery was necessary to save Nicholas' life. However, attempts to repair the injury to Nicholas' intestines and other abdominal-related injuries were unsuccessful, and Nicholas died.

An autopsy revealed that major organs in Nicholas' body had been split in two by considerable blunt-force trauma consistent with being stomped by an adult. Specifically, the

medical examiner reported that Nicholas "died of internal bleeding due to massive abdominal trauma resulting from blunt for[ce] injury." The surgeon's testimony likened Nicholas' injuries to those caused by such events as exiting an automobile traveling at sixty miles per hour or being dropped twenty feet.

ADMISSION OF APPELLANT'S SECOND WRITTEN STATEMENT

In his first point of error, appellant claims that the trial court "failed to conduct a proper *Jackson v. Denno* hearing on the issue of the voluntariness of [his] second written statement," thus depriving him of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. *Jackson v. Denno*, 378 U.S. 368 (1964). Appellant does not assert that the *Jackson* hearing itself was in any way improperly conducted. Rather, appellant appears to complain that the findings and conclusions the trial judge made following the hearing are inaccurate, incomplete, and not supported by the record. *See* art. 38.22, § 6. Specifically, appellant claims that, in his findings and conclusions, the trial judge "failed to rule on [specifically enumerated] important fact issues" raised by appellant's own testimony at the suppression hearing. Thus, appellant concludes, the trial court improperly found the

statements to have been voluntarily made.

When a question is raised as to the voluntariness of a statement made by the accused, the trial court is required to make an independent finding, out of the presence of the jury, as to whether the statement was made under voluntary conditions. Art. 38.22 § 6. If the statement is determined to have been voluntarily made, the court is further required to "enter an order stating its conclusion as to whether or not the statement was voluntarily made, along with the specific finding of facts upon which the conclusion was based." *Id.* The findings must be sufficiently detailed to enable the appellate court to determine the basis for the trial court's ruling and to assist the appellate court in determining the sufficiency of the evidence to support any implied findings that were made by the fact finder. *Guidry v. State*, 9 S.W.3d 133, 140-42 (Tex.Crim.App. 1999), *cert. denied*, 531 U.S. 837 (2000). Nothing in Article 38.22, § 6, requires the trial court to make specific findings about why conflicting testimony does not render the defendant's statement involuntary. *Id.* Rather, the trial court need only state in its findings the reasons for its conclusion that the statement was voluntary. *Id.* In other words, the trial court need only set out those facts which *support* its conclusions; not facts which *do*

not support its conclusions. *Id.*

In a pretrial *Jackson v. Denno* hearing, Officer Jose Lopez testified that on February 29, 2000, he was dispatched to the home of a child who had stopped breathing. Appellant told Lopez that he had been watching the television when Dylan came into the room and told him that Nicholas was into breathing. According to appellant, Dylan told him that "he had held [Nicholas'] mouth" and then he stopped breathing. Lopez then allowed appellant to leave to go to the hospital. Lopez noted that appellant did not appear to be under the influence of alcohol or any other types of intoxicants.

Detective Tony Tabullo arrived at the hospital to assess the situation. Because appellant was the last adult known to be with Nicholas, Tabullo asked him if he would be willing to discuss the incident with him at the Crimes Against Persons (CAP) offices. Appellant agreed because he understood from working as a security guard that such discussions were standard procedure. Tabullo asked appellant if he wanted to ride with him or if he wanted to drive to the office in his own vehicle. Appellant initially indicated that he would drive to the office with his mother. However, once outside the hospital, appellant changed his mind and asked to ride with Tabullo.

Tabullo and appellant arrived at the CAP offices around 11:05 p.m. After offering appellant a beverage, Tabullo and appellant sat down in Tabullo's cubicle to discuss the incident. Before asking appellant any questions, Tabullo handed appellant a card which set out his *Miranda* warnings and asked appellant to read the warnings.[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966). After appellant read the card, Tabullo asked him if he understood his rights, and appellant indicated that he did. In fact, appellant indicated that he knew "all about the Miranda warnings" because he was a security guard. Appellant then signed the card, and wrote the date and time on it. Tabullo advised appellant that he was not under arrest and that he was free to leave at any time. However, he reiterated that he did want to talk to appellant about the incident. Tabullo specifically advised appellant that he had the right to an attorney, and appellant said that he did not want one and that he did want to talk to the detective. As Tabullo and appellant talked, Tabullo typed. Tabullo testified that appellant was very clam and did not appear to be under the influence of alcohol or any drugs or

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[2] Although Tabullo kept referring to the warnings as "Miranda" warnings, the warnings actually comply with Article 38.22..

narcotics. Tabullo also told the court that appellant did not appear to be under duress.

When they finished, Tabullo asked appellant to read each paragraph of the statement that he had typed. Tabullo also instructed appellant to initial each paragraph noting that he had read and understood it. The first two paragraphs of the typed statement contained the same legal warnings that appellant had previously read from the card. In this statement, appellant stated that he had been watching television when Dylan called him and told him that Nicholas was not breathing. Appellant stated that Dylan later told him that he and Nicholas had been wrestling when he put his hand over Nicholas' mouth, and Nicholas fainted. Appellant signed on the last page of the statement. This statement ended at 2:10 the morning of March 1, 2000.

After taking appellant's first statement, Tabullo told appellant that his mother was outside. Appellant asked Tabullo to tell his mother that he would call her when he was finished. He also asked Tabullo if he was still free to leave at any time; Tabullo told him that he was. At 2:25 a.m., Tabullo again had appellant read his rights and sign, date and place the time on the card noting that he understood those rights. Tabullo again

asked appellant if he wanted an attorney, and appellant told him that he did not. Appellant noted that he was willing to continue talking to Tabullo. Shortly thereafter, Tabullo received from other detectives polaroid photographs which appeared to show an adult-sized footprint on Nicholas' stomach. Tabullo confronted appellant with the photographs, after which appellant orally admitted to stomping Nicholas. Tabullo asked appellant for his shoes, which appellant gave him. Tabullo then took appellant to be fingerprinted and photographed. Appellant signed a document indicating that he knew that he could refuse to be fingerprinted and photographed. After these procedures were completed, Tabullo and appellant returned to the interview room and continued talking. Appellant never asked to terminate the interview, and willingly talked to Tabullo.

Tabullo began typing the second statement at 5:46 a.m. Appellant's legal rights again appeared at the top of this statement. After he finished typing the document, Tabullo handed the statement to appellant and advised him to read it. Appellant signed the document, but did not write the ending time on the document or initial the individual paragraphs. In response to questions from appellant's counsel, Tabullo admitted that appellant could have slept between the statements.

However, Tabullo never saw him sleep, and appellant was "fully awake" when he signed the second statement. Tabullo's partner, Detective Terry Kozak, and Officer Lopez witnessed the signing of the second statement. Lopez testified that appellant did not appear to be under duress when he signed the second statement. Lopez further opined that appellant was not forced or coerced into signing the statement.

After the State rested, appellant took the stand in his own defense. Appellant claimed that he did not read this statement before he signed it. He noted that after he had finished the first statement, Tabullo told him that he needed "to clear up a few things on the statement." Appellant said that he thereafter fell asleep until he was awakened by Tabullo telling him to sign the corrected statement. Appellant said that he did not know what he was signing; he just took Tabullo's word that it was a corrected version of the first statement.

The trial court denied appellant's motion to suppress his written statements and entered the following findings and conclusions:

> The Court hereby finds that the Voluntary Statements of the Accused were freely and voluntarily made without compulsion or persuasion. The Detective read the Miranda warnings to the Defendant from the Miranda card

> provided by the El Paso Police Department [citation to exhibit omitted]. The Defendant initialed the card and stated he understood his rights. The Defendant freely and voluntarily waived his rights including his right to an attorney and his right to remain silent. Prior to giving both Voluntary Statement of Accused, the Defendant was read his Miranda warnings again from the top of each statement, stated he understood his rights and freely and voluntarily waived his rights.

Although the judge's finding that appellant "was read" his rights prior to giving each statement is not precisely accurate, the record does support the fact that appellant was given his rights in writing (and to some extent verbally) at least twice before the taking of each statement and another time in between them. Furthermore, appellant unequivocally admitted that he was familiar with his rights. Additionally, the record supports the judge's findings that appellant waived his rights and that he made both statements without compulsion or persuasion. Finally, although the judge's findings and conclusions were sparse, we hold that they are sufficiency detailed to enable this Court to determine the basis for the trial court's ruling and to assist us "in determining the sufficiency of the evidence to support whatever unstated findings of fact were made by the fact finder." *Guidry*, 9 S.W.3d at 140-42. Appellant's first

point of error is overruled.

In his second point of error, appellant claims that the trial court should have suppressed his second written statement because it was obtained in violation of the Texas Constitution, Article I, §§ 9 and 10, and Texas Code of Criminal Procedure Articles 14.06 and 15.17. Specifically, appellant contends that his second written statement should have been suppressed because the State failed to take him before a magistrate without undue delay. Had he been promptly taken before a magistrate, appellant "would likely have not signed the second statement."

Articles 14.06 and 15.17 require that the person making the arrest shall "without unnecessary delay" take the person arrested or have him taken before a magistrate of the county where the accused was arrested. However, this Court has consistently held that violations of these articles do not automatically invalidate a confession. *See Rocha v. State*, 16 S.W.3d 1, 29-30 (Tex.Crim.App. 2000)(Holland, J., concurring); *Cantu v. State*, 842 S.W.2d 667, 680 (Tex.Crim.App. 1992). Rather, an accused must show a causal connection between the accused's confession and the failure to take the accused promptly before a magistrate before the validity of the confession is affected. *Williams v. State*, 692

S.W.2d 671, 675 (Tex.Crim.App. 1984). *See also Ex parte Stansbery,* 702 S.W. 2d 643,647 (Tex.Crim.App. 1986). This Court has also held that a confession that was obtained prior to the accused being taken in front of a magistrate is admissible as long as his *Miranda* warnings had been read to him before the statement was taken. *Curry v. State*, 910 S.W.2d 490, 496 (Tex.Crim.App. 1995).

The evidence is uncontroverted that appellant willingly accompanied Tabullo to the CAP offices around 11:05 p.m., February 29, 2000, to speak with him about how Nicholas became injured. It is also not disputed that appellant could have terminated the interview and left the CAP offices at any time before about 2:25 a.m., March 1, 2000, when he first admitted to "stomping" Nicholas. After appellant orally confessed to hurting Nicholas, Tabullo took polaroid pictures of him. He then took appellant to be fingerprinted and officially photographed. However, before either of theses events took place, appellant was told that he had a right to refuse to be fingerprinted and photographed. Appellant signed a waiver of those rights. Appellant then accompanied Tabullo back to his cubicle where Tabullo typed appellant's second statement. Appellant and two witnesses signed that statement around 6:50

a.m. Immediately after that, Tabullo told appellant that he was under arrest. Tabullo went to procure a warrant, and appellant was taken before a magistrate close to 8:00 a.m.

Appellant correctly notes that he was arrested without a warrant. However, his oral confession to Tabullo, coupled with the photograph Tabullo received showing the apparent image of an adult footprint across Nicholas' stomach, gave Tabullo probable cause to arrest him. *See Anderson v. State*, 932 S.W.2d 502, 506 (Tex.Crim.App. 1996)(*citing New York v. Harris*, 495 U.S., 14 (1990)), *cert. denied*, 521 U.S. 1122 (1997). Even if the time between appellant's oral admission that he hurt Nicholas and the time that he was finally taken before a magistrate could be considered unreasonable, appellant has still failed to show a causal connection between his confession and any delay in taking him before a magistrate. Appellant readily admitted that he was aware of his statutory rights. In addition, he was informed of those rights at least three times prior to giving his statement. Under these circumstances, the trial court did not err in refusing to suppress appellant's second written statement. Appellant's second point of error is overruled.

ADMISSION OF PHOTOGRAPHS

In his third and fourth points of error, appellant claims that the trial court violated Texas Rule of Evidence 403 by admitting into evidence State's Exhibits 16, 17, and 18. Appellant contends that the photographs were unfairly prejudicial because they show Nicholas' body in a mutilated condition due to the actions of the medical examiner.

In his second statement to the police, appellant claimed that when he saw Nicholas lying on the floor of the bedroom, he did not "know what came over [him]" but he went over to the boy and "stamped on him hard" with his right foot. Appellant claimed this was the only injury he inflicted on the boy. The State argued, on the other hand, that two additional bruises on Nicholas' torso which the medical examiner categorized as "fresh" indicated that appellant inflicted more injury to the boy than just a single "stamp." The State also presented, without objection, testimony from the medical examiner regarding several bruises on Nicholas' head. However, the doctor testified without equivocation or contradiction that these bruises were a few days old and not inflicted at the same time as the injury which caused Nicholas' death or the other two bruises to his torso. The State claims that the three exhibits about which

appellant now complains were offered for the purpose of illustrating and explaining the extent of Nicholas' injuries.

The exhibits at issue are three 5-inch by 7-inch color autopsy photographs. State's Exhibit 16 shows a view of Nicholas' major organs after the medical examiner has cut open the length of his torso and spread the sides apart. State's Exhibit 17 shows the upper one-third of Nicholas' body. His chest is still open with the ribs spread and the organs removed, and the front half of his scalp has been cut and peeled down over his face. Finally, State's Exhibit 18 shows Nicholas' head and shoulders from the back. In this photograph, the back half of Nicholas' scalp has been peeled down and is hanging across Nicholas' shoulders much like a hood on a jacket would hang down. Each photograph is close-up, highly graphic, and extremely gruesome. These are the only photographs showing Nicholas' injuries from an internal perspective.

In reviewing whether these exhibits were properly admitted, we determine whether the probative value of the slides is substantially outweighed by the danger of unfair prejudice. TEX.R.EVID. 403. We review a trial judge's decision regarding the admissibility of evidence for an abuse of discretion. We will reverse the judge's decision only if it was

outside the zone of reasonable disagreement. *Salazar v. State*, 38 S.W.3d 141, 150-53 (Tex.Crim.App.), *cert. denied*, 534 U.S. 855 (2001); *Navaiz v. State*, 840 S.W.2d 415 (Tex.Crim.App. 1992), *cert. denied*, 507 U.S. 975 (1993). A judge need engage in a Rule 403 balancing test only when the evidence at issue is relevant. TEX.R.EVID. 401-403; *Long v. State*, 823 S.W.2d 259, 271 (Tex.Crim.App. 1991), *cert. denied*, 505 U.S. 1224 (1992).

In *Rojas v. State*, 986 S.W.2d 241, 249 (Tex.Crim.App.1998), and *Santillan v. State*, 939 S.W.2d 155, 172 (Tex.Crim.App. 1997), this Court held that autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. The main concern in these cases was that the jury might attribute certain injuries caused by the autopsy to the appellant, which would unfairly prejudice the appellant's case. *See Rojas*, 986 S.W.2d at 249 (holding autopsy photographs admissible because the gun shot wounds and trauma to the pelvic area that are depicted in the photographs were a result of appellant's actions, not the performance of the autopsy); *Santillan*, 939 S.W.2d at 173 (holding that a change rendered as part of the autopsy process which is of minor significance does not prevent the admission of

the picture when the disturbing nature of the photograph is due primarily to the injuries caused by appellant).

Photographs depicting "mutilation" by the medical examiner may still be admissible, and therefore excepted from the general prohibition, when the resulting picture (such as an organ that has been removed from the body) shows bruising or other damage that is attributable to the defendant's actions, but was not visible externally, thereby making the photograph highly relevant to the manner of death. *Ripkowski v. State*, 61 S.W.3d 378, 392-93 (Tex.Crim.App. 2001); *see also Salazar*, 38 S.W.3d at 150-53.

State's Exhibit 16 presents just such an exception to the general prohibition against photographs depicting mutilation. Although doctors could see bruising on the external surface of Nicholas' body, it was not until they opened his body that they saw the full extent of injuries appellant caused him, *i.e.*, a crushing impact so severe that it ripped his internal organs into pieces. Although extremely graphic and explicit, State's Exhibit 16 was highly probative of the manner of Nicholas' death and the extent of his injuries. The trial judge did not abuse his discretion in allowing the admission of State's Exhibit 16. Point of error three is overruled.

State's Exhibits 17 and 18, on the other hand, show mutilation attributable to the medical examiner, but do not fit the exception to the mutilation cases. State's Exhibit 17, showing Nicholas with the front half of his scalp peeled down over his face and a chest and abdominal cavity devoid of any organs, and State's Exhibit 18, showing Nicholas with the back half of his scalp peeled down and draped across his shoulders were offered to show the jury additional injuries Nicholas had suffered, namely, five bruises on his head, resulting, according to testimony, from five different blows. However, these bruises, the medical examiner testified, were "a few days" old, and occurred separate from the crime for which appellant is charged. In fact, the State presented no evidence that connected appellant to these bruises, or connected these bruises to the present crime. Thus, these two photographs were not relevant in the guilt phase of appellant's trial, and should not have been subjected to a Rule 403 balancing test or admitted into evidence over appellant's objection. Lack of relevancy notwithstanding, under the facts of this case, this is not the end of our inquiry.

Appellant failed to object at the guilt phase to testimony regarding the bruising found on Nicholas' head during the

autopsy. Therefore, appellant may have waived any relevancy complaint under Rule of Evidence 401 that he had regarding photographs on the same topic, making it necessary for us to review the trial court's Rule 403 decision on the issue. *See* TEX.R.APP.P. 33.1.

When performing a Rule 403 analysis, the trial court must consider " the host of factors affecting probativeness...and balance those factors against the tendency, if any, that the photographs have to encourage resolution of material issues on an inappropriate emotional basis." *Salazar*, 38 S.W.3d at 152; *Ladd v. State*, 3 S.W.3d 547, 568 (Tex.Crim.App. 1999), *cert. denied*, 529 U.S. 1070 (2000). When determining the proclivity of pictures to spur emotional decision-making, the court should examine the "number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color, [and] whether they are close-up." *Salazar*, 38 S.W.3d at 152; *Long*, 823 S.W.2d at 272. Additionally, relevant criteria in determining whether the prejudicial effect of a piece of evidence substantially outweighs the probative value include the fact "that the ultimate issue was not seriously contested by the opponent; that the State had other convincing evidence to establish the ultimate issue to which the [evidence] was

relevant; that the probative value of the...evidence was not, either alone or in combination with other evidence particularly compelling; that the [evidence] was of such a nature that a jury instruction to disregard it for any but its proffered purpose would not likely be efficacious." *Reese v. State*, 33 S.W.3d 238, 241 (Tex.Crim.App. 2000)(citing *Montgomery v. State*, 810 S.W.2d 372, 392-93 (Tex.Crim.App. 1990)). The trial court should also, if applicable, consider the fact that the body has been altered since the crime in some way (*e.g.*, by autopsy) that might enhance its gruesomeness to the defendant's detriment. *Narvaiz*, 840 S.W.2d at 429.

State's Exhibits 17 and 18 have little probative value, if any. The State failed to connect the injuries depicted in the photographs to appellant. Indeed, one expert witness testified that the bruises were consistent with infant rambunctiousness or accident and did not signal intentional abuse. The photographs were in no way necessary to show the manner of the victim's death or the extent of the injuries that appellant caused.

On the other hand, these photographs have a high tendency to "encourage resolution of material issues on an inappropriate emotional basis." *Ladd*, 3 S.W.3d at 568. Both photographs are in color and close-up. By no action

attributable to appellant, both are extremely graphic and gruesome in that the boy's scalp has been turned inside out, and one picture further depicts an empty shell of a body. Testimony further revealed that some damage was done to the skin under the scalp as the medical examiner peeled it back. However, while the damage that the medical examiner inflicted is the central focus of the pictures, it does not make up the entire picture. Rather, enough of the boy's intact body features are shown around the edges of the pictures to remind the viewer that he is indeed looking at the remains of a small boy. Plus, the inclusion of the pictures allowed the implication that appellant somehow had something to do with the infliction of the bruises found on the child's scalp.

Given the circumstances of this particular case, we hold that the trial court abused its discretion in determining that the probative value of these photographs was not substantially outweighed by the danger of unfair prejudice. *See Salazar*, 38 S.W.3d at 153 n.10 (emphasizing that, while the trial court did not abuse its discretion under the facts of *Salazar*, the case should not be taken as an indication that it is, in general, acceptable to admit photographs of organs removed from a victim during the autopsy). Having found that the trial court

abused its discretion, we must perform a harm analysis. *Reese*, 33 S.W.3d at 243.

The appropriate standard of harm is found in Texas Rule of Appellate Procedure 44.2(b), which states that "[a]ny other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." In *Johnson v. State*, 967 S.W.2d 410, 417 (Tex.Crim.App. 1998), this Court explained that "[a] criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect."

The evidence in the instant case focused on the fact that appellant was the last adult with Nicholas before he received a crushing blow injury to the abdomen-an injury which revealed the image of an adult's footprint. Further, this injury was so severe that his internal organs were severed. On the other hand, the medical examiner clearly testified that the bruises on Nicholas' head were not inflicted on the day of his death, nor did they contribute to his death. Finally, the testimony concerning these bruises was brief and was not emphasized. From this record, this Court has fair assurance that the error did not influence the jury at either stage of trial, or had but a slight

effect. Point of error four is overruled.

COMPETENCY OF WITNESS

In his fifth point of error, appellant asserts that the trial court reversibly erred in ruling that Dylan Salinas was a competent witness and in allowing him to testify. Texas Rule of Evidence 601(a)(2) places the power to determine a witness' competency into the hands of the trial judge. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex.Crim.App. 1995), *cert. denied*, 519 U.S. 826 (1996). A ruling by the trial court will not be disturbed upon review unless an abuse of discretion is shown. *Id.* Under Rule 601, a child is considered competent to testify unless it appears to the court that he does not possess sufficient intellect to relate the transaction about which he will testify. *Id.* The ability to relate encompasses both "an ability to understand the questions asked and to frame intelligent answers" as well as "a moral responsibility to tell the truth." *Watson v. State*, 596 S.W.2d 867, 870 (Tex.Crim.App. 1980); see also 1 STEVEN GOODE ET AL., TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 601.2 (2d ed. 1993 & Supp. 1998). There is no particular age below which a child is automatically deemed incompetent to

testify. *Fields v. State*, 500 S.W.2d 500, 502 (Tex.Crim.App. 1973); GOODE ET AL., *supra*. Inconsistencies in a child's testimony, while probative on the issue of competency, do not alone render the child incompetent. *Fields*, 500 S.W.2d at 503.

In a hearing outside the presence of the jury, the judge questioned Dylan to determine if he was competent to testify. During that hearing, the judge determined that Dylan knew his full name, and he could correctly spell "Dylan." Dylan knew that he was five years old and that he went to a school named Putman. He said that he sometimes read, but he did not like it. Dylan could also accurately recite his alphabet. When asked in the abstract whether he knew the difference between telling the truth and telling a lie, Dylan said that he did not. However, when given a concrete example (*e.g.*, it was sunny outside or it was snowing outside), Dylan could accurately tell the judge which was true and which was not true. Dylan also did not comprehend the abstract definition of "truth," but when given a concrete example (*e.g.*, did you eat all of the cookies when your mother told you not to), he knew to tell the truth, thereby demonstrating an understanding of the concept. Dylan also demonstrated an understanding of the difference between right and wrong, such as, it was wrong to take someone else's apple

at school. Finally, Dylan promised to listen to the questions that the lawyers might ask him and to answer those questions truthfully if he knew the answer.

Given this record, we hold that the judge did not abuse his discretion in finding Dylan competent to testify. Appellant's fifth point of error is overruled.

EFFECTIVE ASSISTANCE OF COUNSEL

In five separate points of error, appellant contends that his trial counsel rendered ineffective assistance. Specifically, appellant complains that his counsel rendered ineffective assistance when he:

> (Point of error seven) made several statement during his punishment phase argument which illustrated a shift in trial strategy from denying guilt to accepting blame, which shift in strategy appellant did not consent to;
>
> (point of error eight) cross-examined Nicholas' mother at punishment in such a manner that she ultimately characterized appellant as very jealous and a ticking "time bomb";
>
> (point of error nine) failed to object to the State's alleged mischaracterization of the manner of Nicholas' death in the State's argument at both phases of trial, *i.e.*, that appellant inflicted more

than just one stomping injury;

(point of error ten) failed to timely tender to the trial court a videotape interview of Dylan Salinas which would have shown the court that the child was not a competent witness;

(point of error eleven) moved to have Nicholas' body exhumed for a general examination.

The proper standard for reviewing and ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668 (1984) (adopted by this Court in *Hernandez v. State*, 726 S.W.2d 53 (Tex.Crim.App. 1986)). Under *Strickland*, an appellant must first demonstrate that his trial counsel's performance was deficient. Secondly, he must show that his counsel's deficient performance was so serious that it prejudiced this defense, rendering the trial unfair and the verdict suspect. *Strickland*, 466 U.S. at 687; *Lockhart v. Fretwell*, 506 U.S. 364 (1993). In other words, appellant must prove by a preponderance of the evidence that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that this deficient performance rendered the result of the proceeding unreliable. *Strickland*, 466 U.S. at 687. Appellate review of defense counsel's representation is highly deferential and

presumes that counsel's actions fell within the wide range of reasonable and professional assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002); *Chambers v. State*, 903 S.W.2d 21, 33 (Tex.Crim.App. 1995). The analysis of effective assistance is undertaken in light of the "totality of the representation" rather than by examining isolated acts or omissions of trial counsel. *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex.Crim.App. 1986) *cert. denied*, 480 U.S. 940 (1987). The fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance. *Miniel v. State*, 831 S.W.2d 310, 325 (Tex.Crim.App. 1992).

Under most circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the strong presumption that counsel's conduct was reasonable and professional. *Bone*, 77 S.W.3d at 833. At this Court recently explained, rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation: "[i]n the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial

counsel." *Id.* A reviewing court can frequently speculate on both sides of an issue, but ineffective assistance claims are not built on retrospective speculation; rather, they must "be firmly founded in the record." *Id.*

The record in the instant case is not sufficiently developed on appellant's claims of ineffective assistance of counsel set forth in points of error seven, eight, and eleven. Therefore, we can only speculate as to why counsel took the actions (or failed to take the actions) that he did, and such speculation is beyond the purview of this Court. *Id.*; *see also Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex.Crim.App. 1994)(Baird, J., Concurring); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex.Crim.App. 1997). Points of error seven, eight, and eleven are overruled.

In his ninth point of error, appellant contends that his counsel was ineffective for failing to object to the State's "mischaracterization" of the manner of Nicholas' death. Specifically, appellant complains that his counsel should have objected to the State's argument at punishment that the existence of two additional bruises on Nicholas' torso indicated that appellant had inflicted more than just one stomping injury.

Proper jury argument includes four areas: (1) summation

of the evidence presented at trial, (2) reasonable deduction drawn from the evidence, (3) answer to the opposing counsel's argument, or (4) a plea for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 673 (Tex.Crim.App. 2000). To constitute reversible error, the argument must be manifestly improper or inject new, harmful facts into the case. *Id.* The prosecutor's argument was permissible as a reasonable deduction drawn from the evidence, and defense counsel's failure to object did not constitute ineffective assistance of counsel. Point of error mine is overruled.

In his tenth point of error, appellant contends that his counsel was ineffective for failing to timely tender to the trial court a videotape interview of Dylan Salinas which, he asserts, would have shown the court that the child was not a competent witness. The videotape interview to which appellant refers show a conversation between Detective Brian Fuller and Dylan Salinas. The conversation occurred just past midnight on March 1, 2000, more than a year before Dylan was called to testify at appellant's trial.

As previously held in point of error five, the trial judge did not abuse his discretion in determining that Dylan was competent to testify at appellant's trial, given the testimony

presented at the competency hearing. Whether Dylan was competent to testify mere hours after the offense and more than a year before the trial was not material to this decision. Given these circumstances, we will not hold the appellant's counsel was deficient for failing to timely present the videotape for the court's consideration. *Strickland*, 466 U.S. at 687. Point of error ten is overruled.

SUFFICIENCY OF THE EVIDENCE OF FUTURE DANGEROUSENESS

In his sixth point of error, appellant complains that the evidence presented at trial was insufficient to support the jury's finding that he would probably be a continuing threat to society. *See* Art. 37.071 § 2(b)(1). In reviewing the sufficiency of the evidence at punishment, this Court looks at the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have believed beyond a reasonable doubt that appellant would probably commit criminal acts of violence that would constitute a continuing threat to society. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Allridge v. State*, 850 S.W.2d 471, 487 (Tex.Crim.App. 1991), *cert. denied*, 510 U.S. 831 (1993). The facts of the crime alone can

be sufficient to support the affirmative finding to the future dangerousness special issue. *Allridge*, 850 S.W.2d at 488.

During the guilt phase of trial, the jurors heard that appellant was the only adult with 19-month-old Nicholas when he was hurt. They heard that the child was so badly injured that several of his organs were literally ripped in two. The doctors told them that the force required to cause these types of injuries was extreme. Testimony that Nicholas had two additional 'fresh" bruises on his torso in addition to the one in the shape of a shoe print enabled the prosecutor to argue his version of the scenario for the jury. In this version of events, appellant kicked Nicholas twice before finally, fatally stomping him to death.

At punishment, the State presented no evidence of a prior criminal history, other bad acts, or psychological evidence. However, the facts of the instant case with its young, helpless victim gave the jurors enough information to permit them to conclude that appellant would continue to be a threat to society. Appellant not only stomped on a defenseless 19-month-old with enough force to sever his internal organs, but if the jury believed the prosecutor's version of the events, appellant kicked him twice before delivering the final fatal blow. Further, a rational juror could have believed that, when appellant did call for help,

he intentionally misled paramedics about the nature of the child's injuries. Also, appellant attempted to blame Nicholas' injuries on an equally defenseless four-year-old boy. When appellant finally admitted his actions, he could give no explanation for what he did. Appellant's actions show a wanton and callous disregard for human life. *See Martinez v. State*, 924 S.W.2d 693, 696-97 (Tex.Crim.App. 1996)(holding that close-range stabbing showed wanton and callous disregard for human life and was sufficient evidence to support jury's affirmative answer to the future dangerousness issue). Under these facts, we hold the evidence legally sufficient to support the jury's affirmative answer to the future dangerousness issue. *Jackson*, 443 U.S. at 319; *Martinez*, 924 S.W.2d at 696-97. Point of error six is overruled.

We affirm the judgment of the trial court.

Delivered: July 2, 2003

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9/10/2003
RE: Case No. AP-74,142
STYLE: AVILA, RIGOBERTO, JR.

On this day, the Appellant's motion for rehearing has been denied.

Troy C. Bennett, Jr.

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El Paso, Texas 79901



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